ORIGINAL

No. 87-5781

IN THE UNITED STATES SUPREME COURT

December Term, 1987

GREGORY SCOTT ENGLE

Petitioner

vs.

STATE OF FLORIDA

Respondent

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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NO. _____

IN THE UNITED STATES SUPREME COURT

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GREGORY SCOTT ENGLE

Petitioner

vs.

STATE OF FLORIDA

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, State of Florida, respectfully suggests that the Petition for Writ of Certiorari should be denied.

JURISDICTION

The Petitioner's Statement is accepted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's statement is accepted.

STATEMENT OF THE CASE

As set forth in the Petitioner's Statement of the Case, the Petitioner and Rufus Stevens were charged by indictment with first-degree murder in the slaying of Eleanor Kay Tolin. The Petitioner's trial was severed from that of Rufus Stevens. The Respondent rejects the Petitioner's statement of the trial testimony and sets forth the following facts as determined by the Florida Supreme Court in Engle v. State, 510 So.2d 882-884 (Fla. 1987):

Testimony at trial indicated that at about 9:50 a.m. on March 13, 1979, Eleanor Kathy Tolin was present at a Majik Market in Jacksonville where she worked as a cashier. Approximately thirty minutes later the store was found unlocked and unattended and sixty-seven dollars was missing from the cash drawer. On the following day Tolin's body was found in a wooded area. It was apparent from scratches on her face that she had been dragged some distance, though she was probably dead at the time. The medical examiner, Dr. Florio, determined from his autopsy that the cause of death was ligature strangulation and multiple stab wounds in the back. He said that the victim was alive at the time of the strangulation. Dr. Florio found a four inch laceration in the interior of the vagina which he believed was most likely caused by the insertion of a hand and the making of a fist. Because of bleeding Dr. Florio concluded that Tolin was alive when this occurred.

Several days later, as a result of a traffic stop, police learned that Nathan Hamilton knew something about the murder. Based on information obtained from Hamilton, appellant[1] and Rufus Stevens were arrested for Tolin's murder. When interviewed by the police appellant denied taking part in the Majik Market robbery. He told detectives that on March 13, 1979, he had been riding around drinking beer with Stevens from 2:00 a.m. until daybreak. The police showed him a Buck pocketknife engraved with the initials S.E. which he acknowledged looked like his knife.

At trial, Hamilton testified that at about 8:00 p.m. on March 12, 1979, he and Stevens began driving around and drinking together. Stevens suggested that they rob a motel, but after stopping at the Majik Market where Tolin worked, Stevens stated that they ought to rob the Majik Market. When Hamilton objected

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[1] In the course of the Florida Supreme Court's recitation of the facts the Petitioner, Gregory Scott Engle, is referred to as the Appellant.

that the clerk could identify them as they both lived in the neighborhood, Stevens said they could take her out of the store and get her away from the phone. Stevens and Hamilton picked up appellant between 1:30 a.m. and 2:00 a.m. Stevens asked appellant if he wanted to rob a Majik Market and appellant agreed to do so. Stevens and appellant then dropped Hamilton off at his apartment.

At the trial, Hamilton identified the knife with appellant's initials as belonging to appellant and said he had never seen appellant without it. He further testified that several days after the murder Stevens told him that "We got to get rid of Scott's [appellant's] knife because that was what it was done with." At Stevens' request Hamilton tried to get the knife from appellant the next evening telling him that Stevens had said the knife was used to commit the murder. Appellant tossed his knife to Hamilton and asked if he saw any blood on it, but he would not let Hamilton have the knife. Hamilton asked appellant if he thought it was worth "a lousy fifty or sixty dollar robbery to take a girl out of a store and kill her." Appellant replied that he did not. When Hamilton asked him why he did it, appellant said that when they got her out of the store Stevens went crazy and started saying she was going to identify them. Hamilton told police that he thought appellant would be the easier of the two from whom to obtain a confession.

Appellant's landlady testified that in the early morning of the day the murder was committed appellant came into the house counting money. He told her that he had been drinking beer with Stevens and that Stevens had given him twenty dollars. Several witnesses testified to a conversation that occurred between Stevens and appellant on the day of their arrest. At that time Stevens warned appellant that Hamilton might be turning them in for Tolin's murder. Appellant replied that he had no reason to

run. He said that the police couldn't prove anything, but later he did try to hide his knife.

Bloodstains found on Stevens' car and on the knife identified as belonging to appellant matched Tolin's blood type, but not that of appellant or Stevens. The knife was of a type consistent with the stab wounds in Tolin's back. There were dried semen stains of undetermined origin on the backseat of Stevens' car. Hair found on the backseat and floorboard of Stevens' car likely came from the victim. A broken kitchen knife found hidden under Stevens' house trailer could have caused the mark on the victim's back below the three stab wounds. Engle v. State, 510 So.2d 882-884.

The Petitioner was convicted of first degree murder and the advisory jury recommended that he receive a sentence of life imprisonment. The trial judge, John E. Santora, Jr., overrode the recommendation of the jury and imposed a sentence of death. In so doing, the trial judge found that there were four aggravating circumstances and no mitigating circumstances.

Rufus Stevens, who was jointly indicted with the Petitioner on a charge of first degree murder in the slaying of Eleanor Kay Tolin, was tried separately from the Petitioner. Following a jury trial Stevens' was found guilty of first degree murder and the jury recommended that a life sentence be imposed. The same trial judge who presided at the Petitioner's trial, Judge John Santora, was the judge presiding over the trial of Rufus Stevens. He overrode the advisory opinion of the jury, finding four aggravating circumstances and no mitigating circumstances, and imposing a sentence of death. On appeal before the Florida Supreme Court the trial judge's imposition of the death sentence was upheld in Stevens v. State, 419 So.2d 1058 (Fla. 1982). Stevens' petition for a writ of certiorari was denied by this Court in Stevens v. Florida, 459 U.S. 1228 (1983) (Justice Brennan and Justice Marshall dissenting).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

On direct appeal in Engle v. State, 438 So.2d 803 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 753 (1984) the Florida Supreme Court affirmed the Petitioner's conviction, "but reversed the sentence of death, because in overriding the jury's recommendation of life imprisonment the trial judge had considered a confession of another person which had been introduced at a separate trial" Engle v. State, 510 So.2d at 882. The court remanded with instructions for the trial court to conduct another sentencing hearing. Upon resentencing, Judge Santora once again imposed the death sentence, finding there were four aggravating and no mitigating circumstances.

The Florida Supreme Court reviewed the aggravating circumstances found by the trial court upon resentencing, listing them as follows:

> A. THE FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF, OR IN ATTEMPTING TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, A ROBBERY, SEXUAL BATTERY, ARSON, BURGLARY, KIDNAPPING, OR AIR CRAFT PIRACY OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.
>
> B. THE CAPITAL FELONY WAS COMMITTEED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.
>
> C. THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.
>
> D. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

In Engle v. State, 510 So.2d 881 (Fla. 1987) the Florida Supreme Court affirmed the trial court's sentence of death. The Petitioner filed a Motion for rehearing which was denied by the Florida Supreme Court on September 3, 1987.

ARGUMENT

ISSUE I

THE FLORIDA SUPREME COURT USED THE APPROPRIATE STANDARD OF REVIEW IN DETERMINING THE PROPRIETY OF THE TRIAL COURT'S OVERRIDE OF THE JURY RECOMMENDATION OF LIFE IN THE INSTANT CASE. (Restated).

The issue raised by the Petitioner is not one of great magnitude and his petition for a writ of certiorari should be denied by this Court. In reviewing the Petitioner's case, the Florida Supreme Court applied an accepted standard of review that has been repeatedly upheld by this Court as being appropriate. The Petitioner presents no cognizable claim before this Court that is worthy of review, and his argument is in substance merely an expression of his disagreement with the trial court's and Florida Supreme Court's refusal to find that his role in the murder of Kay Tolin rendered him less culpable for his acts than was Rufus Stevens. As the role of this Court is not to sit as a reweigher of facts that have already been heard and decided upon by the Florida Supreme Court, the argument presented by the Petitioner must fail.

Contrary to the Petitioner's claim that the Florida Supreme Court has adopted an arbitrary and capricious standard of review in jury override cases, a review of the instant case sets forth that the Court used accepted standards of review as set forth by the court in Tedder v. State, 322 So.2d 908 (Fla. 1975) and approved by this Court in Spaziano v. Florida, 468 U.S. 447 (1984)

In reviewing the Petitioner's case the Florida Supreme Court from the outset cited to Tedder v. State, and stated that if there was a reasonable basis for the jury recommendation of life, the Court must give effect to that recommendation. Engle v. State, 510 So.2d 881 (Fla. 1987). In that forum, the Petitioner made virtually the same argument that he is attempting to present

here, namely, that Rufus Stevens was the dominant party and therefore it was reasonable for the advisory jury to recommend that the Petitioner receive a life sentence. The Florida Supreme Court has rejected this contention, stating the following grounds:

> Appellant does not seriously contend that what was done to Tolin does not warrant imposition of the death penalty. In essence, he contends that the jury recommendation was plausible because there was no direct evidence that appellant, rather than Stevens, actually did the killing. Appellant points out that it was Stevens' idea to rob the Majik Market and refers to his own statement to police that Stevens had gone crazy. Appellant also suggests that the jury could have concluded that Stevens was the more dominant of the two because Hamilton thought appellant would be more likely to confess.
>
> Upon consideration, we conclude that the trial judge properly overrode the jury recommendation. There is ample support in the record for each of the aggravating circumstances. Appellant admitted his participation in the abduction. He acknowledged that he was with Stevens during the entire span of time within which Tolin was murdered. The evidence supports the conclusion that it was appellant's knife which caused the fatal stab wounds and that appellant returned home with some of the money from the Majik Market robbery. It would be unreasonable under these circumstances to conclude that appellant played no part in the brutal slaying. Hence, there was not a reasonable basis for the jury's recommendation of life imprisonment.
>
> We affirm the sentence of death.
>
> It is so ordered. Id. at 883-884.

In Spaziano v. Florida, 468 U.S. 447, 465-467 (1984) this Court approved of the manner in which the Florida Supreme Court reviews overrides of jury recommendation of life. In Spaziano, as in the instant case, the trial court found the existence of aggravating circumstances and the absence of any mitigating circumstances. In upholding the Florida Supreme Court's ruling that a jury override was properly imposed in Spaziano, this court noted that

death is comparatively inappropriate, the Court stated in Brown, that the sentence must be reduced to life. Id. 392 So.2d at 1331.

The Court in Brown noted that its role did not include weighing or re-evaluating the evidence used to establish aggravating and mitigating circumstances. The Court instead stated its role as follows:

> Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation. Id. at 1331.

The Petitioner has presented no facts to demonstrate that in this case the reviewing court strayed from its two-fold role. Instead, the Petitioner's relies on the opinions dissenting from this court's decison denying certiorari to the respective petitioners in Heiney v. Florida, 469 U.S. 920 (1984) (Marshall, J., joined by Brennan, J., dissenting from the denial of certiorari) and Eutzy v. Florida, 471 U.S. 1045 (1985) (Marshall, J. joined by Brennan J. dissenting from the denial of certiorari). The Petitioner's reliance on these dissenting opinions is lacking in persuasive merit. It is evident that aside from the Petitioner's bald assertions that the Florida Supreme Court has imposed the death penalty in this instance in a manner that denigrates the Petitioner's supposed lesser culpability, the Petitioner has set forth no basis upon which to base his claim. The court upheld the imposition of the death sentence in full accord with the standards set forth in Tedder v. State, and approved by this Court in Proffitt and Spaziano. It

is not this Court's role to reweigh the facts and circumstances of this case further than has already been done in accord with the dictates of Tedder v. State and Brown v. Wainwright, and the Respondent therefore requests that the Petitioner's petition for certiorari be denied.

ISSUE II

THE FLORIDA SUPREME COURT HAS NOT ADOPTED A CONSTITUTIONALLY DEFECTIVE METHOD OF REVIEW IN JURY OVERRIDE CASES.

The Petitioner compares four jury override cases and inductively reasons that the Florida Supreme Court's method of review is defective. From this, Petitioner takes the sweeping position that the Florida Supreme Court is improperly reviewing jury override cases. This conclusion is patently incorrect. In Proffitt v. Florida, 428 U.S. at 251-252 this Court recognized that when imposing a sentence of death the sentencing judge must focus on the "individual circumstances of each homicide and each defendant." Id. at 252. (Emphasis supplied by Respondent). Likewise, it is up to the reviewing court to individually review each jury override and determine whether it meets the requirements of Tedder v. State. The Petitioner has demonstrated no shortcoming of the reviewing court sub judice by his mere recitation of cases in which a jury override was held to be improper, and his contrast of those cases with others where the court upheld the validity of the override. If anything, a review of these cases only indicates that the Florida Supreme Court is in fact conscientiously and carefully reviewing each case on an individualized basis to ensure that jury overrides are proportional, and comply with the dictates of Tedder v. State.

The Petitioner is also incorrect in his assessment that a jury override was improper due to his supposed lesser culpability in the murder of Eleanor Kay Tolin. The Petitioner portrays himself as a follower, who was dominated by Rufus Stevens. The Respondent disagrees with the Petitioner's portrayal of himself and his assessment of his role in the crime as it is at odds with the trial court's findings. Aside from the petitioner and Rufus Stevens no one lived to attest to the exact role each person played in the murder of Eleanor Kay Tolin, and that is not

pertinent here. What was found by trial judge John Santora in resentencing the Petitioner to death is important, and the relevant findings by the trial court show that the Petitioner's portrayal of himself as less culpable is merely wishful thinking:

> Evidence produced at trial established that the victim, Kathy Tolin, a young mother of two children, was working as a clerk in a convenience store. Tolin was robbed, abducted, raped, mutilated, and then murdered. This court finds that the evidence presented at trial conclusively establishes that Gregory Engle was an active participant in all phases of this crime and at least contemplated that lethal force be used and finds that the only appropriate sentence is death, for the following reasons: (Followed by a list of the four aggravating factors relied on by this trial court).
>
> See, Appendix A, Judgment and Sentence of Trial Court.

The Petitioner's situation is wholly unlike that presented in Enmund v. Florida, 458 U.S. 782 (1982), where the defendant was sentenced to death despite the fact that his sole connection with the homicide was that he drove the getaway car that was used to flee the robbery scene following the robbery and double slaying of an elderly couple in their home. There were no facts showing that the defendant in Enmund ever entered the home, actually killed the couple, or even that he ever intended or attempted to kill them. Unlike the situation in Enmund, the findings in the Petitioner's case demonstrates his active participation in all phases of the abduction, rape, and murder of Eleanor Kay Tolin. Not only is the Petitioner's claim that he played no dominant role in the crime unsupported by the facts, it is noteworthy that it is also the same argument made by Rufus Stevens in his unsuccessfull attempt to challenge the jury override in his case. On direct appeal in Stevens v. State, 419 So.2d 1058 (Fla. 1982), it was argued that Rufus Stevens in his confession claimed that the Petitioner carried out the actual killing! Id. at 1060 (See, Appendix B, Stevens v. State, 419

So.2d 1058). Yet whether each blamed the other for the slaying, and who actually strangled and stabbed the victim, is not the overriding concern sub judice. What is important is that the evidence presented at trial and the findings of the trial court and Florida Supreme Court clearly demonstrated the active role played by the Petitioner throughout the commission of the murder. The question of who actually inflicted the fatal wounds and which of the two, Petitioner or Stevens, initially conceived of the idea to rob the Majik Market and abduct, rape and kill Eleanor Kay Tolin, does nothing to ameliorate the Petitioner's degree of culpabilty for acts he fully participated in. In the case of Tison v. Arizona, 481 U.S. ___, 95 L.Ed.2d 127, 109 S.Ct. ___ (1987) this Court upheld the trial court's imposition of the death penalty in a situation where neither petitioner was the actual triggerman who murdered four people. In so doing this court cited to the findings of the trial court as to the level of active involvement of the petitioner, Ricky and Raymond Tison, in the murders:

> The petitioner's own personal involvement in the crimes was not minor, but rather, as specifically found by the trial court, "substantial." Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each petitioner was actively involved in every element of the kidnapping-robbery and was physically present during the entire sequence of criminal activity culminating in the murder of the Lyons family and the subsequent flight. The Tisons' high level of participation in these crimes further implicates them in the resulting deaths. Accordingly, they fall well within the overlapping second intermediate position which focuses on the defendant's degree of participation in the felony. Id. 95 L.Ed.2d at 144.

Further, this Court held that major participation in the felony being committed combined with a reckless indifference to human life, standing alone, is enough to satisfy the culpability requirement of Enmund v. Florida. Id. 95 L.Ed.2d at 145. Here,

as in Tison, the findings of the trial court supported the active involvement of the Petitioner in the events leading up to and including the murder of Eleanor Kay Tolin. He was therefore found to be equally culpable regardless of whether he inflicted the fatal wounds himself, a fact which in all probability will never be known.

The Florida Supreme Court properly reviewed the jury override in this case using the Tedder standard. The Petitioner has set forth no basis for this Court to revisit the facts of this case and conduct a review of the trial records and the detailed facts and circumstances that led to the trial court's imposition of the death sentence sub judice. The Petitioner has set forth no compelling basis for review of the decision of the Florida Supreme Court in this case and has not demonstrated any arbitrariness in the Court's method of review in jury override cases. His petition for writ of certiorari should therefore be denied.

CONCLUSION

The federal claims raised by the Petitoner were resolved by the Florida Supreme Court in a manner consistent with the requirements of this Court. The Petitioner has set forth no reasons for this Court to accept his case and the Respondent respectfully requests that his Petition for Writ of Certiorari be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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CERTIFICATE OF SERVICE

I Carolyn M. Snurkowski, Assistant Attorney General, hereby certify that I am a member of the bar of the Supreme Court of the United States, and that I have served a copy of the Response to Petiton for Writ of Certiorari to the Supreme Court, Brief for Respondent in opposition, by depositing same in the United States Mail, first class postage prepaid, as follows:

Steven L. Bolotin
Polk County Courthouse
Post Office Box 9000, Drawer PD
Bartow, Florida 33830

All parties required to be served have been served on this 2nd day of December, 1987.

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 79-1180-CF

DIVISION:

STATE OF FLORIDA

vs.

GREGORY SCOTT ENGLE

JUDGEMENT AND SENTENCE

By order of the Florida Supreme Court in an opinion dated September 15, 1983, this court was directed to resentence this defendant. Pursuant to the order by the Florida Supreme Court this court held an evidentiary hearing and both the State and the defendant were allowed to present evidence. In resentencing this defendant the court has reassessed all aggravating and mitigating circumstances without taking into consideration inadmissible statements made by Rufus Stevens. Additionally, the court has thoroughly studied the record in this case and considered all arguments by counsel for both the State and the defense.

Evidence produced at trial established that the victim, Kathy Tolin, a young mother of two children, was working as a clerk in a convenience store. Tolin was robbed, abducted, raped, mutilated, and then murdered. This court finds that the evidence presented at trial conclusively establishes that Gregory Engle was an active participant in all phases of this crime and at least contemplated that lethal force be used and finds that the only appropriate sentence is death, for the following reasons:

I. AGGRAVATING CIRCUMSTANCES

A. THE FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF, OR IN ATTEMPTING TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, A ROBBERY, SEXUAL BATTERY, ARSON, BURGLARY, KIDNAPPING, OR AIRCRAFT PIRACY OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

Engle's roommate testified that Engle had borrowed a knife the night. The defendant made certain incriminating statements to Nathan Hamilton concerning blood on his knife, and further statements that it had not been worth killing a girl for $50 or $60 dollars.

Other evidence establishing this aggravating circumstance includes: (1) the victim's blood was found on the trunk latch in the car used in the abduction, (2) semen was found on the backseat of the car used in her abduction, and (3) testimony from the Medical Examiner establishing that the victim had been the subject of a violent sexual battery.

The only conclusion a reasonable person could draw from the evidence taken in it's totality is that Kathy Tolin, a young, petite, mother of two, was robbed, kidnapped, brutally raped, and mutilated, before being violently murdered.

B. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR AFFECTING AN ESCAPE FROM CUSTODY.

The evidence presented at trial conclusively established that Gregory Engle and Rufus Stevens murdered Kathy Tolin to prevent their apprehension. Both Engle and Stevens lived in the neighborhood in which the convenience store was located and both were known to the victim. Additionally, the defendant made statements to a witness concerning Stevens' fear that the victim would identify both he and Stevens.

The only reasonable inference that can be drawn from the evidence is that Kathy Tolin was murdered so that her killers would not be apprehended.

C. THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

Evidence proved beyond any doubt that the murder of Kathy Tolin was the conclusion of a criminal episode that began in the scheme of Engle and Stevens to rob the convenience store.

D. THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

Testimony established that a large object had been inserted into the victim's vagina causing a severe laceration. After being assaulted, she was brutally murdered. Testimony revealed that the victim was first strangled with a ligature and while she was still

alive an unsuccessful attempt was made to stab her in the back with a broken knife later found to belong to Rufus Stevens. The knife belonging to Gregory Engle was used to repeatedly stab her in the back penetrating her lungs.

The evidence established beyond any doubt that Kathy Tolin's murderers by their acts, cruelly inflicted unbelievable terror, wickedness, and cruelty all of which were designed to inflict a high degree of pain with utter indifference to the suffering of Kathy Tolin.

III. MITIGATING CIRCUMSTANCES

The Court finds there exists no mitigating circumstances.

IV. SENTENCE

After careful consideration of all statutory aggravating circumstances and statutory and non-statutory mitigating circumstances, this court finds there are four aggravating circumstances and no mitigating circumstances. This crime was accompanied by such extraordinary facts as to clearly set it apart from the norm of capital felonies. Therefore, Gregory Scott Engle is hereby adjudicated Guilty of Murder in the First Degree and is hereby sentenced to death by electrocution. Sentence of Death shall be executed upon the Governor issuing a warrant, attaching it to the copy of the record, and transmitting it to the Superintendent of the State Prisons, directing him to execute the sentence at the time designated in the warrant.

This sentence of Death is subject to automatic review by the Supreme Court of Florida within 60 days after certification of the record; therefore, this case is certified for review by the Supreme Court.

March 26, 1986

John A. Santora
JUDGE

Paul William SCOTT, Appellant,
v.
STATE of Florida, Appellee.
No. 58588.
Supreme Court of Florida.
Sept. 13, 1982.

Robert M. Leen of Leen & Schneider, Hollywood, for appellant.

Paul Morris, Miami, Stewart J. Bellus, Asst. Atty. Gen., West Palm Beach, for appellee.

The Motion for Substitution of Counsel is granted; Leave to Supplement Motion for Rehearing and Brief and Argue the Applicability of *Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 is denied. The Motion to Supplement has been treated as a proper Notice of Additional Authority. The Motion for Rehearing, 411 So.2d 886 (Fla.), is denied.

ALDERMAN, C. J., and ADKINS, BOYD, SUNDBERG and McDONALD, JJ., concur.

OVERTON, J., dissents with an opinion.

OVERTON, Justice, dissenting.

I dissent from the denial of the petition for rehearing. There is a serious disparity in the sentencing of Scott and his codefendant, Kondian, who pleaded guilty to murder and was sentenced to forty-five years imprisonment after the petitioner, Scott, was tried by a jury, convicted of murder, and sentenced to death. Petitioner correctly asserts that we have not addressed this issue in these proceedings. Even when the accomplice has been sentenced subsequent to the sentencing of the defendant seeking review, it is proper for this Court to consider the propriety of disparate sentences, *see Witt v. State*, 342 So.2d 497, 500 (Fla. 1977), to determine whether a death sentence is appropriate given the conduct of all participants in committing the crime. We should consider this issue at this time, rather than wait and see it arise for a second review in a motion under Florida Rule of Criminal Procedure 3.850. It appears from the record that the trial judge considered the respective roles of Scott and his codefendant in committing the murder, and this is an issue we can decide in this review.

I would, therefore, grant the petition for rehearing to allow this Court to address the appropriateness of Scott's death sentence in view of the sentence imposed on his codefendant. This issue should not be left unresolved.

Rufus Eugene STEVENS, Appellant,
v.
STATE of Florida, Appellee.
No. 57738.
Supreme Court of Florida.
Sept. 14, 1982.

Defendant was convicted before the Circuit Court, Duval County, John E. Santora, Jr., J., of murder in the first degree with death sentence imposed, and defendant appealed. The Supreme Court held that: (1) defendant's spontaneous statement prior to commencement of polygraph examination, which was a condition precedent to plea bargain, was not made "in connection with plea negotiations" within meaning of exclusion rule; (2) it was not abuse of discretion to refuse to allow defendant to drink two cases of beer to demonstrate his state of intoxication when he confessed; and (3) court properly declined to follow jury's recommendation of life sentence.

Affirmed.

McDonald, J., concurs in part and dissents in part with an opinion, with which Overton, J., concurs.

1. Criminal Law ⇐408

Whether a defendant's subjective expectation of negotiating a plea is reasonable depends on whether the state has indicated a willingness to plea bargain and has in fact solicited the statement in question from defendant. West's F.S.A. § 90.410; West's F.S.A. Rules Crim.Proc., Rule 3.172(h).

2. Criminal Law ⇐408

Unsolicited, unilateral utterances are not statements "made in connection with plea negotiations" for purpose of statute rendering inadmissible evidence of statements made in connection with a plea. West's F.S.A. § 90.410; West's F.S.A. Rules Crim.Proc., Rule 3.172(h).

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐408

Defendant's inculpatory spontaneous statement prior to being connected to polygraph machine were not "made in connection with plea negotiations" within meaning of statute governing admissibility of such statements, where although polygraph examination was condition precedent to plea bargain the statements were not made during an actual examination or in response to preliminary questions and defendant made the statements spontaneously without any prompting or inducement and defendant had no reasonable subjective belief that his statement was part of the plea negotiations. West's F.S.A. § 90.410; West's F.S.A. Rules Crim.Proc. Rule 3.172(h).

4. Criminal Law ⇐412.1(4)

A police interrogator must neither abuse a suspect nor seek to obtain a statement by coercion or inducement nor otherwise deprive him of his Fifth or Sixth Amendment rights. U.S.C.A.Const. Amends. 5, 6.

5. Criminal Law ⇐412.1(4), 519(9)

A police interrogator's job is to gain as much information about the alleged crime as possible without violating constitutional rights, and it is not his duty to apprise a suspect of the possible punishment for the crime under investigation and, hence, confession was not inadmissible notwithstanding fact that interrogating officer was evasive when defendant asked whether the case might lead to the death penalty. U.S.C.A.Const.Amends. 5, 6.

6. Criminal Law ⇐388

Admissibility of a test or experiment lies within the discretion of the trial judge.

7. Criminal Law ⇐388

A court should admit evidence of scientific tests and experiments only if reliability of the results are widely recognized and accepted among scientists.

8. Criminal Law ⇐650

It was no abuse of discretion to refuse to permit defendant to drink two cases of beer to demonstrate to the court his state of intoxication when he confessed especially in view of testimony that defendant was coherent and functioning normally at time of arrest.

9. Criminal Law ⇐1208(1)

Court-appointed psychiatrists' report of no extreme mental or emotional disturbance on part of defendant did not warrant finding of applicability of capital penalty mitigating circumstance of mental or emotional disturbance precluding defendant from appreciating criminality of his conduct. West's F.S.A. § 921.141(6)(d, f).

10. Criminal Law ⇐1208(1)

Capital penalty aggravating circumstance that defendant's participation was relatively minor and that he acted under substantial domination of another was not warranted where there was evidence that defendant initially approached another and proposed robbing convenience store and defendant admitted mutilating the victim's vagina. West's F.S.A. § 921.141(6)(d, e).

11. Criminal Law ⇐685

Sentencing judge must accord great weight to a jury's recommendation of life imprisonment, but may decline to follow it if the facts indicating that a sentence of death is appropriate under the law are so clear and convincing that virtually no reasonable person could differ.

12. Criminal Law ⇐1208(1)

Death was appropriate punishment where record amply supported findings of four aggravating circumstances and total lack of mitigating circumstances and it was proper for the judge to override the jury's recommendation of life as that recommendation was not based on any valid mitigating factor discernible from the record.

John R. Forbes, Jacksonville, for appellant.

Jim Smith, Atty. Gen. and Raymond L. Marky, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This cause is before the Court on appeal from a judgment of the Circuit Court of the Fourth Judicial Circuit in and for Duval County. The appellant was convicted of murder in the first degree. After receiving the jury's recommendation of a sentence of life imprisonment, the trial court sentenced appellant to death. This Court has jurisdiction of the appeal. Art. V, § 3(b)(1), Fla. Const. We affirm the judgment and sentence.

During the early morning hours of March 13, 1979, Eleanor Kathy Tolin, while working as cashier at an all-night convenience store, was robbed, abducted, raped, and killed. The appellant Rufus Stevens and his friend Scott Engle were jointly indicted on a charge of first-degree murder. The two defendants were tried separately.

Appellant was arrested at his home at about 9:30 a.m. on March 20, 1979. Later that morning appellant signed a confession admitting participation in the robbery, abduction, and rape, but placing the blame for the murder on Engle. Before trial, appellant moved to suppress his confession on the ground that his state of severe intoxication at the time rendered his statement involuntary. At the hearing on the motion to suppress, appellant testified that during the day and evening preceding his arrest and interrogation, he consumed one and one-half to two cases of beer and some whiskey. An expert testified that such a level of alcohol consumption would have an extremely debilitating effect on a normal person's cognitive and motor processes. The state presented testimony that at about midnight on the night of his arrest, by which time most of the alcohol consumption appellant testified to would have been completed, appellant was able to converse coherently and drive a car. The arresting officer and the interrogating officer testified that at the time of arrest and during questioning, appellant was intelligible and capable of coherent conversation. In conjunction with his motion to suppress, appellant asked for an opportunity to reproduce the effects of the alcohol ingestion he testified to, in order to demonstrate to the court his mental state at the time of his confession. The court declined to allow such test or demonstration and denied the motion to suppress.

Based on appellant's confession in which he admitted participation in the robbery and abduction but blamed the actual killing on Engle, the state indicated a willingness to allow appellant to plead guilty in exchange for a recommended sentence of life imprisonment rather than death, or to plead guilty to a lesser, non-capital offense. As a condition precedent to such a plea bargain, the state demanded a polygraph examination for the purpose of determining the extent of appellant's participation in the criminal episode leading to the murder. Appellant agreed to submit to the polygraph test.

At the place and time scheduled for the examination, only appellant and the police polygraph examiner were present. Before being connected to the machine, appellant spontaneously made some statements concerning his participation in the crime. The immediate result of appellant's utterances was that the examiner did not proceed with the examination. A further result was that the state discontinued the plea negotiations, since appellant's statements were inconsistent with his earlier confession.

The defense moved to exclude these statements on the grounds that they were

made in connection with plea negotiations and that the state had promised that the polygraph statement would not be used in evidence. The trial court ruled that the statements could not be used by the state in its case in chief but deferred ruling on whether they might be used in rebuttal.

At trial the state presented evidence that Kathy Tolin disappeared from her job during the early morning hours of March 13, 1979. Her body was later discovered in a wooded area nearby. She had been raped, strangled, stabbed, and mutilated. Either the strangulation or the stabbing could have been the cause of death.

The interrogating officer testified to appellant's confession made soon after his arrest. According to this statement, appellant directly participated in robbing, kidnapping, and raping the victim. He and his accomplice abducted her from the store and took her into some woods. Appellant said, however, that she ran away after being raped, and that Engle ran after her. Fifteen minutes later, according to the confession, Engle returned, dragging the dead body of the victim. Then appellant and Engle placed the body in the trunk of appellant's car and removed it to another wooded area.

A state witness who was well acquainted with both appellant and Engle testified that he was present when appellant and Engle made a plan to rob the convenience store, and that they left him at his home at about 2:00 a.m. on the night of the murder and departed, with robbery as their stated purpose, in appellant's car, with appellant driving. After the murder, the witness testified, appellant remarked to him "We got to get rid of Scott's knife because that's what it was done with." Testimony and Proceedings, vol. V, at 573. This witness also testified that he talked with Engle about the murder and that Engle refused to give up his knife, indicating that he did not believe the knife could be linked to the murder. The witness testified:

> I asked him why they did it and he said that they took her out of the store to get her away from a phone. They took her out into the country and Rufus went crazy and started saying she's going to identify us. And I asked him, I said, man, was it worth killing a little gal over a lousy fifty-dollar robbery and he said no, it wasn't.

Id. at 577–78.

The testimony of the state's main witnesses was corroborated by several items of physical evidence. Police recovered the knife identified as belonging to Scott Engle and established as having been the murder weapon. A minute amount of blood was found on the knife which could have been the blood of Kathy Tolin but could not have come from Engle or appellant. Blood found in the trunk of appellant's car was also of the victim's blood type. Hairs recovered from the back seat and trunk of appellant's car were probably those of the victim, according to expert testimony.

Appellant argues four points on appeal. He maintains that (1) the court erred in refusing to grant in full his motion to exclude the statements he made to the polygraph examiner; (2) that the court erred in denying his request to conduct an experiment to demonstrate the effects of the level of alcohol intoxication with which he asserts he was afflicted at the time of his arrest and interrogation; (3) that the court erred in refusing to suppress his confession; and (4) that the court erred in sentencing him to death when the jury recommended life imprisonment.

On the first point, appellant argues that the court's ruling, excluding the statement to the polygraph examiner from evidence on the state's case in chief, left open the possibility that the statement could have been used for impeachment or rebuttal purposes in the event appellant had testified in his own defense. Indeed it did leave open such a possibility since the court specifically stated in its order of exclusion that in the event of the defendant's choosing to testify in his own defense, the court would entertain a proffer of the statement for purposes of impeachment. Appellant argues that the statement should have been completely excluded and that the error prejudiced his

defense by preventing him from testifying in his own behalf.

[1, 2] Appellant argues that his statement was made in connection with plea negotiations and was therefore inadmissible for any purpose under section 90.410, Florida Statutes (1979)[1] and Florida Rule of Criminal Procedure 3.172(h).[2] The state argues that the trial judge was correct in its ruling. The fact that the statement was excludable from the case in chief, the state argues, should not provide a license for an accused to commit perjury free from the risk of being confronted with prior inconsistent statements, citing *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975) and *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). The state had agreed that the polygraph results would not be used in evidence; however, the state argues that the statement in question is not part of the result of a polygraph examination.

To determine whether a statement is made in connection with plea negotiations, a court should use

> a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances.

United States v. Robertson, 582 F.2d 1356, 1366 (5th Cir. 1978) (en banc); *see also United States v. O'Brien*, 618 F.2d 1234 (7th Cir.), *cert. denied*, 449 U.S. 858, 101 S.Ct. 157, 66 L.Ed.2d 73 (1980); *United States v. Pantohan*, 602 F.2d 855 (9th Cir. 1979). Whether a defendant's subjective expectation of negotiating a plea is reasonable depends on whether the state has indicated a willingness to plea-bargain and has in fact solicited the statement in question from the defendant. Unsolicited, unilateral utterances are not statements made in connection with plea negotiations. *See Blake v. State*, 332 So.2d 676 (Fla. 4th DCA 1976).

[3] We conclude that the statement in question was not made in connection with plea negotiations. Although the polygraph examination was arranged so that appellant's version of the criminal episode could be substantiated and although this was agreed to so that the parties could proceed to reach a negotiated plea, appellant's spontaneous, unilateral statement was not connected to those negotiations in the sense contemplated by the rule of exclusion we are applying. The statement was not made during an actual polygraph examination nor was it made in response to any preliminary questions. Appellant made the statement spontaneously without any prompting or inducement. Appellant had no reasonable subjective belief that his statement was a part of the plea negotiations. Therefore, not only was the trial court correct in holding that the statement was admissible for impeachment, but the court could also have ruled the statement admissible for use in the state's case in chief.

[4, 5] Next appellant argues that the court should have excluded his confession from evidence. He contends that, although he was advised of his Fifth Amendment rights in the standard fashion, he was led to believe that if he cooperated with police he would obtain leniency. In support of this contention appellant points not to any actual police inducement, but to the fact that the interrogating officer was evasive when appellant asked him whether the case might lead to the death penalty being imposed. In essence appellant contends that without

1. 90.410 Offer to plead guilty; nolo contendere; withdrawn pleas of guilty.—Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

2. (h) Except as otherwise provided in this Rule, evidence of an offer or a plea of guilty or nolo contendere, later withdrawn, or of statements made in connection therewith, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

knowing that a sentence of death was a possible penalty, he cannot have knowingly waived his constitutional right to remain silent. *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The same kind of argument was raised in *United States v. Hall*, 396 F.2d 841 (4th Cir.), *cert. denied*, 393 U.S. 918, 89 S.Ct. 248, 2 L.Ed.2d 205 (1968). The court rejected the argument saying:

> It is undisputed that at the time of arrest Agent Dowling did not inform Hall of the punishment he might receive if he were convicted of the robbery with which he was charged. Hall argues that without this knowledge he simply was not in a position to make the knowing and voluntary waiver contemplated by *Miranda*. *Miranda*, however, reflects the Supreme Court's concern that an accused might, to his detriment, forfeit rights afforded him by the Constitution simply because he was not aware that he possessed such rights. We do not find in that decision any intimation that knowledge of the punishment for the crime with which he was charged is a prerequisite to a valid waiver of constitutional rights and we conclude that the validity of Hall's waiver is not vitiated by the admitted absence of knowledge or information as to the possible punishment.

Id. at 845. We agree. A police interrogator must neither abuse a suspect, nor seek to obtain a statement by coercion or inducement, nor otherwise deprive him of Fifth or Sixth Amendment rights. As a safeguard against such improprieties, the *Miranda* warnings have been prescribed. But a police interrogator's job is to gain as much information about the alleged crime as possible without violating constitutional rights, and it is not his duty to apprise a suspect of the possible punishment for the crime under investigation. The ultimate punishment to be meted out upon one convicted of a crime depends on the nature of the formal charges filed, which is often a function of prosecutorial discretion, the outcome of the trial, and the exercise of discretion by the sentencing judge. At the investigatory stage of the criminal justice process, it is quite proper for an investigating officer to decline to speculate on the possible ultimate result. Therefore we hold that the court did not err in denying the motion to suppress the confession.

[6-8] Appellant's third point is that the trial court erred in denying appellant's novel and imaginative request to be allowed to drink two cases of beer in order to demonstrate to the court his state of intoxication when he confessed. He argues that the experiment should have been allowed because the result would have been relevant to the question of whether he was capable of intelligently and voluntarily waiving his constitutional rights.

The admissibility of a test or experiment lies within the discretion of the trial judge. *Reid v. State*, 68 Fla. 105, 66 So. 725 (1914); *Hisler v. State*, 52 Fla. 30, 42 So. 692 (1906). A court should admit evidence of scientific tests and experiments only if the reliability of the results are widely recognized and accepted among scientists. *Rodriguez v. State*, 327 So.2d 903 (Fla. 3d DCA), *cert. denied*, 336 So.2d 1184 (Fla.1976); *Coppolino v. State*, 223 So.2d 68 (Fla. 2d DCA 1968), *appeal dismissed*, 234 So.2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927, 90 S.Ct. 2242, 26 L.Ed.2d 794 (1970); 3 S. Gard, *Jones on Evidence*, § 15:9 (6th ed. 1972).

To allow the defendant to present himself to the court for observation after drinking two cases of beer would have had a very predictable result but would not, it seems to us, have risen to the dignity of an accepted scientific test or experiment. Appellant's motion was supported only by his own testimony that he was so intoxicated that he was not aware of what he was doing. There was other testimony, however, that he was coherent and functioning normally at the time of his arrest. Therefore we conclude that the trial court did not abuse its discretion in denying the motion.

We come now to the propriety of the sentence of death. The trial judge found that the murder was committed in the commission of or flight after committing rape and kidnapping, an aggravating circumstance under section 921.141(5)(d), Florida Statutes (1977); that it was committed for the purpose of avoiding or preventing a lawful arrest, *id.*, § 921.141(5)(e); that it was committed for pecuniary gain, *id.*, § 921.141(5)(f); and that it was especially heinous, atrocious, or cruel. *Id.*, § 921.141(5)(h). The judge also specifically found that the defense established no mitigating circumstances.

There was sufficient evidence to support the trial judge's findings that the four aggravating circumstances were proven beyond a reasonable doubt. Evidence presented at the guilt phase of the trial established that the murder was the ultimate result of a closely connected chain of events that included kidnapping and sexual battery. Thus the court was correct to conclude that the aggravating circumstance in section 921.141(5)(d)[3] applied. The finding that the murder was committed for pecuniary gain was supported by evidence that appellant and his accomplice took money from the store's cash register, the property of the victim's employer and in her possession until the robbery and abduction. That the murder was committed for the purpose of avoiding arrest for crimes already committed was established by testimony about appellant's own statement to his accomplice expressing fear of detection and apprehension and insisting on the need to eliminate the victim as a possible identifying witness. *See Adams v. State*, 412 So.2d 850 (Fla.1982). Finally, the terror and pain the victim must have felt while being abducted, brutally raped, and then strangled and stabbed to death, establishes that the capital felony was especially heinous, atrocious, or cruel. *E.g., Jackson v. State*, 366 So.2d 752 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); *Knight v. State*, 338 So.2d 201 (Fla. 1976).

Appellant argues that the trial judge erred in failing to find the existence of mitigating circumstances. He argues that the court should have found that he had no significant history of prior criminal activity. § 921.141(6)(a), Fla.Stat. (1977). The court found, however, that appellant had previously been convicted of theft, receiving stolen property, and criminal trespass. In addition, during the sentencing hearing, a teenage girl testified that appellant had raped her. Thus there was no reason for the court to find a lack of significant history of prior criminal activity. *See Dobbert v. State*, 328 So.2d 433 (Fla.1976), *aff'd*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

[9] Appellant argues that the court should have found that due to intoxication and extreme mental or emotional disturbance, his ability to appreciate the criminality of his conduct and to conform to the requirements of the law was substantially impaired. § 921.141(6)(b), (f). There was no evidence to support such findings. A court-appointed psychiatrist reported no extreme mental or emotional disturbance. No testimony supported a finding of impaired capacity. Therefore the court did not err in declining to find these factors. *See Meeks v. State*, 336 So.2d 1142 (Fla.1976).

[10] Appellant argues that the trial court should have found that his participation in the crime was relatively minor and that he acted under the substantial domination of another person. § 921.141(6)(d), (e). The trial judge specifically found, however, that both appellant and Engle were guilty of the crimes and that neither was under the domination of another. There was testimony at the guilt phase of the trial that appellant initially approached Engle and proposed robbing the store. In addition, the same witness testified that Engle told him after the incident that the murder also was appellant's idea. Furthermore, the presentence investigation received by the sentencing judge but not provided to the

3. Section 921.141(5)(d) reads: "The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb."

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jury supplied further information concerning the crime. In statements made to the court-appointed psychiatrist, appellant conceded that the robbery and kidnapping were originally his idea. He also admitted to mutilating the victim's vagina. Therefore there was sufficient evidence for the court to refuse to find that appellant's role was minor or that he was dominated by Engle.

[11, 12] Finally, appellant argues that the trial court erred in overriding the jury's recommendation of life imprisonment. The sentencing judge must accord great weight to a jury's recommendation of life imprisonment, but may decline to follow it if the facts indicating that a sentence of death is appropriate under the law are "so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975). The record amply supports the judge's findings of four aggravating circumstances and a total lack of mitigating circumstances. Therefore, death is the appropriate punishment. *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974). Under the properly established facts and circumstances, it was proper for the judge to override the jury's recommendation. The recommendation of life was not based on any valid mitigating factor discernible from the record. *See Hoy v. State*, 353 So.2d 826 (Fla.), *cert. denied*, 439 U.S. 920, 99 S.Ct. 298, 58 L.Ed.2d 265 (1978); *Douglas v. State*, 328 So.2d 18 (Fla.), *cert. denied*, 429 U.S. 871, 97 S.Ct. 185, 50 L.Ed.2d 151 (1976).

The judgment of conviction of first-degree murder is affirmed. The sentence of death is affirmed.

It is so ordered.

ALDERMAN, C. J., and ADKINS, BOYD and SUNDBERG, JJ., concur.

McDONALD, J., concurs in part and dissents in part with an opinion, with which OVERTON, J., concurs.

McDONALD, Justice, concurring in part/dissenting in part.

I concur with the affirmance of conviction but dissent on the imposition of the death penalty. The jury recommended that the sentence be life imprisonment. The jury could have concluded that Stevens participated in the robbery and rape, but that Engle was the sole perpetrator of the homicide. There was, therefore, a rational basis for the jury's recommendation and it should have been followed by the trial judge.

OVERTON, J., concurs.

Philip Gene GRABARNICK, et al., Petitioners.

v.

FLORIDA HOMEOWNERS ASSOCIATION OF NORTH BROWARD, INC., et al., Respondents.

No. 60564.

Supreme Court of Florida.

Sept. 14, 1982.

On appeal from judgment of the Circuit Court, Broward County, W. Herbert Moriarity, J., the District Court of Appeal, 395 So.2d 1184, Downey, J., dismissed appeal as untimely, and question was certified as one of great public importance. The Supreme Court, Adkins, J., held that: (1) where final judgment is served upon parties by mail and corresponding motion for rehearing is also served by mail, party serving motion for rehearing does not have additional three days in which to do so, and (2) time for filing petition for rehearing commences to run when judgment sought to be reheard is recorded by clerk of court.

Quashed and remanded.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987, Case No. _____

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GREGORY SCOTT ENGLE,	:	87-5781
Petitioner,	:	
v.	:	AFFIDAVIT OF FILING BY FIRST CLASS UNITED STATES MAIL PURSUANT TO RULE 28.2
STATE OF FLORIDA,	:	
Respondent.	:	

CAME AND APPEARED BEFORE ME, the undersigned authority STEVEN L. BOLOTIN, attorney for petitioner, who first being duly sworn, deposes and says:

That on November 2, 1987, he placed in a United States Post Office Box, with first class postage prepaid, an original and one copy of the Petition for Writ of Certiorari to the Florida Supreme Court in the above-referenced case, and said Petition was duly and properly addressed to the Clerk of the United States Supreme Court. Further, he is duly sworn and authorized member of the Bar of this Court.

Steven L Bolotin
STEVEN L. BOLOTIN
Attorney for Petitioner

STATE OF FLORIDA
COUNTY OF POLK

SWORN TO AND SUBSCRIBED to before me this 3rd day of November, 1987, at Bartow, Polk County, Florida.

NOTARY PUBLIC, State of Florida
t Large

My Commission Expires:

Notary Public, State of Florida at Large
My Commission Expires April 3, 1991

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General (Criminal Appeals), The Capitol, Tallahassee, FL 32301, and to Gregory Scott Engle, #069240, Florida State Prison, P.O. Box 747, Starke, FL 32091, by mail this 2nd day of November, 1987.

Steven L Bolotin
STEVEN L. BOLOTIN

OPINION

SUPREME COURT OF THE UNITED STATES

GREGORY SCOTT ENGLE *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 87–5781. Decided February 29, 1988

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate petitioner's death sentence.

I

Even if I did not hold this view, I would grant the petition for certiorari to consider petitioner's contention that the Florida Supreme Court is applying the review standard of *Tedder* v. *State*, 322 So. 2d 908, 910 (1975) *(per curiam)*, in a manner that has denigrated the role of legitimate mitigating circumstances in Florida's sentencing scheme and that has led to the arbitrary infliction of the death penalty. Petitioner's sentencing jury recommended life imprisonment, but the trial judge overrode the jury's recommendation and imposed the death sentence. Under Florida's unusual system of capital sentencing, the trial judge is given the power to overturn a sentencing jury's rejection of the death penalty. In upholding Florida's sentencing system against various constitutional challenges, this Court repeatedly has relied on the Florida rule, announced in *Tedder*, that "in order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ," *ibid.* See *Spaziano* v. *Florida*, 468 U. S. 447, 465–466

(1984); *Barclay* v. *Florida*, 463 U. S. 939, 955–956, 958 (1983) (REHNQUIST, J., joined by Burger, C. J., and WHITE and O'CONNOR, JJ.); *Proffitt* v. *Florida*, 428 U. S. 242, 249 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). The trial judge in this case failed even to consider the reasonableness of the jury's recommendation and refused to recognize petitioner's lesser role in the crime as a valid mitigating circumstance. The Florida Supreme Court nonetheless affirmed the override of the jury's recommendation, arguing that it would be "unreasonable . . . to conclude that [petitioner] played no part in the brutal slaying." 510 So. 2d 881 (1987) *(per curiam)*. This reasoning evinces a cramped view of mitigating circumstances regarding evidence of petitioner's lesser role that is contrary to the constitutional principles recognized in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). In addition, a review of this and other cases convinces me that the Florida Supreme Court has embraced conflicting views of whether such mitigating evidence may justify the jury's recommendation of life imprisonment. The court's inconsistent application of the *Tedder* standard in felony-murder cases has led to the arbitrary imposition of the death penalty.

Petitioner was charged, along with Rufus Stevens, with the murder of Eleanor Tolin, a cashier at the Majik Market in Jacksonville, Florida.[1] Evidence presented by the state at trial indicated that Stevens had a leadership role and planned the robbery of the market, whereas petitioner was the follower in the scheme. Evidence also indicated that Stevens was the actual killer. During guilt-phase deliberations, the jurors twice asked the judge whether they had "to be convinced the defendant personally killed the victim to render a

[1] Stevens was convicted of Eleanor Tolin's murder in a separate trial. The same trial judge, Judge Santora, overrode the jury's recommendation of life imprisonment and sentenced Stevens to death. The conviction and sentence were affirmed by the Florida Supreme Court. *Stevens* v. *State*, 419 So. 2d 1058 (1982), cert. denied, 459 U. S. 1228 (1983).

[verdict] of murder in the first degree." Pet. for Cert. 5.[2] The penalty phase of the trial began immediately after the jury returned the guilty verdict. No additional evidence was presented. Counsel presented closing arguments and the jury was instructed to base its penalty recommendation on the evidence presented during the guilt phase. In his summation to the jury prior to the sentencing phase, the prosecutor stated:

> "You're concerned whether he had to have actually thrust the knife on her. I know you were concerned about that. . . . But if you believe, if you believe that Rufus Stevens killed that girl for the purpose of not being identified, that he formed the intent to kill her for that purpose, that is first degree murder and then if your believe that [petitioner] gave this knife to Rufus Stevens, you find he is just as guilty as Rufus Stevens."

Id., at 6–7. After deliberating for only 25 minutes, the jury returned a recommendation that petitioner be sentenced to life imprisonment.

Defense counsel argued to the trial judge that the jury's recommendation was reasonable because it was based on the view that Rufus Stevens was the leader, planner, and dominant participant in the robbery and murder, whereas petitioner was the follower and not the actual killer. The trial judge responded: "Are you under the impression that if two men participate in a crime like this, one of them kills her and the other one sits there and aids and abets, that he is not equally guilty? . . . That he should not suffer the same fate?" *Id.*, at 8. The trial judge proceeded to override the jury's recommendation and sentence petitioner to death. On direct appeal, the Florida Supreme Court affirmed petitioner's conviction but reversed the death sentence because the trial

[2] Under Florida law, an individual is guilty of first-degree murder when a killing occurs during the commission of a robbery even though the individual did not actually do the killing. See *Hawkins* v. *State*, 436 So. 2d 44, 46 (Fla. 1983).

judge had considered the testimony of Rufus Stevens at his separate trial in violation of petitioner's Sixth Amendment right of confrontation. See *Engle* v. *State*, 438 So. 2d 803, 813–814 (1983).

Following a new sentencing hearing, the same trial judge found four aggravating circumstances and no mitigating circumstances, and he again sentenced petitioner to death. The judge did not refer to the jury's recommendation of life imprisonment and made no attempt to evaluate the reasoning behind that recommendation. On appeal, petitioner argued that the jury's recommendation of life imprisonment was reasonable and thus should be upheld under the standard of *Tedder* v. *State*, *supra*. As developed by the Florida Supreme Court, and relied on by this Court, the *Tedder* standard requires an inquiry into whether the jury reasonably could have based its recommendation on statutory or nonstatutory mitigating circumstances. See *Amazon* v. *State*, 487 So. 2d 8, 13 (Fla. 1986); *Welty* v. *State*, 402 So. 2d 1159, 1164 (Fla. 1981). Petitioner argued that evidence before the jury—evidence presented by the state's own witnesses—indicated that petitioner played a lesser role in the robbery and murder and that Stevens did the actual killing. The jury's questions during its guilt-phase deliberations, and the remarks of the prosecutor prior to the sentencing phase, reinforced the view that the jury returned its life recommendation based on this lesser role.

The Florida Supreme Court affirmed the imposition of the death sentence. The court held that there was "ample support . . . for each of the aggravating circumstances," 510 So. 2d 881, 884 (1987), and found no error in the trial judge's determination that there were no mitigating circumstances. The court noted petitioner's claim that the jury's recommendation was reasonable because it may have believed that Stevens actually did the killing and was the dominant force behind the robbery. The court concluded, however, that "[i]t would be unreasonable under these circumstances to conclude that [petitioner] *played no part* in the brutal slaying. Hence, there was not a reasonable basis for the jury's recommendation of life imprisonment." 510 So. 2d, at 884 (emphasis added).

The Florida Supreme Court's reasoning thus requires that unless petitioner can show he "played no part" in the killing, evidence that he was not the actual killer, and that his role was as a follower rather than a leader, are not mitigating circumstances on which a reasonable juror could rely in recommending a life sentence. Such a view is wrong as a matter of federal law. In *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), this Court held that any aspect of the defendant's character and the circumstances of the offense may be considered in mitigation. This Court often has recognized that "the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime." *Sumner* v. *Shuman*, 483 U. S. ——, —— (1987). Indeed, in *Tison* v. *Arizona*, 481 U. S. ——, —— (1987), the Court held that a State may never constitutionally impose the death penalty for felony murder unless the defendant was a major participant in the felony and displayed a reckless indifference to human life. By finding the jury's recommendation unreasonable because petitioner was unable to show he played no part in the killing, the Florida Supreme Court ignored the presence of valid mitigating evidence that the jury apparently relied on in rendering its recommendation of life imprisonment. The court's determination denigrates the role of valid mitigating circumstances in Florida's sentencing scheme, contrary to the principles of *Lockett* and *Eddings*.

Completely apart from this infirmity, the Florida Supreme Court's endorsement of the trial judge's refusal to consider the mitigating effect of petitioner's lesser role in this case is at odds with other Florida Supreme Court decisions applying the *Tedder* standard. This inconsistency is unexplained. The haphazard application of the *Tedder* standard in cases in

which an accomplice's lesser role may have influenced the jury's recommendation of life imprisonment convinces me that the Florida sentencing scheme is being applied in a manner inconsistent with the requirements of due process.

The Florida Supreme Court's decisions in *Barclay* v. *State*, 470 So. 2d 691 (1985), and *Hawkins* v. *State*, 436 So. 2d 44 (1983), illustrate the court's occasional readiness to defer to jury recommendations of life imprisonment based on the defendant's lesser role in the capital crime. In *Barclay* the court reversed the trial judge's override of the jury's recommendation of life imprisonment. The defendant Barclay was a member of a group that called itself the Black Liberation Army. The group abducted a hitchhiker and drove him to a trash dump. The victim was then stabbed repeatedly by Barclay, and shot twice in the head by the apparent leader of the group, Jacob Dougan. See *Barclay* v. *State*, 343 So. 2d 1266, 1267 (1977). The Florida Supreme Court held that the jury's recommendation of life imprisonment for Barclay was reasonable. The court argued,

> "The jury apparently distinguished between Barclay and his main co-defendant, Jacob John Dougan, as evidenced by its recommendations of life imprisonment for Barclay (the follower) and death for Dougan (the leader). We hold that there was a rational basis for the jury's distinction between these co-defendants and that the trial court erred in overriding the jury's recommendation."

470 So. 2d, at 695. Similarly, in *Hawkins* the court reversed an override of the jury's recommendation of life imprisonment, noting that evidence indicated that the defendant was not the triggerman, and holding that under those circumstances "there was a reasonable basis for the jury not to recommend the imposition of the death sentence." *Id.*, at 47. Just as Barclay's and Hawkins's roles as followers justified the jury's recommendation of life, petitioner's role as a follower would seem to justify the jury's life recommendation. In the present case, the court did not cite or try to distinguish its holdings in *Barclay* and *Hawkins*, and simply concluded that because petitioner played some part in the murder, the jury's life recommendation was unreasonable. Without more, I fail to see how this reasoning can be squared with *Barclay* and *Hawkins*, in which both defendants also clearly played some part in the murders.

Defendants Barclay, Hawkins, and Engle all were present during violent murders. Each presented evidence in mitigation indicating that they were followers, not leaders, and that they did not do the actual killings. All three were sentenced to die by the trial judge after their juries determined that death was an inappropriate sentence. Barclay and Hawkins are now serving life sentences. If the Florida Supreme Court's decision in this case is allowed to stand, Engle will die in the electric chair. The Florida Supreme Court has not explained how these cases can be reconciled. As petitioner explains, these holdings create confusion as to whether it is wise, or even competent, for defense counsel to emphasize at trial the defendant's lesser role in a capital crime. The opinions in *Barclay*, *Hawkins*, and *Engle* appear collectively to "stand for the proposition that trying a penalty phase or appealing a 'life override' under Florida's capital sentencing scheme is akin to Russian Roulette." Pet. for Cert. 26. I believe the Florida Supreme Court has failed to apply the *Tedder* review standard in a consistent manner in these cases, leading to the arbitrary imposition of the death penalty. I also believe that in the present case the Florida Supreme Court based its decision on a view of mitigation that is contrary to the constitutional principles of *Lockett* and *Eddings*. I would therefore grant the petition for certiorari.